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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 Chrysanthe Cupone, a single woman,  
9

10 Plaintiff,

11 vs.

12 University of Advancing Computer  
13 Technology, Inc. d.b.a. University of  
14 Advancing Technology, an Arizona  
15 corporation; et al.,

Defendants.

No. CV 11-0016-PHX-DGC

**ORDER**

16 Plaintiff's six-count complaint was removed from the Arizona Superior Court for  
17 Maricopa County. Doc. 1. Defendant Pistillo moves to dismiss the claims against him  
18 (Doc. 7), and the other defendants move to dismiss counts II and IV (Doc. 8). The  
19 motions have been fully briefed and the parties do not request oral argument. Docs. 7, 8,  
20 10, 11, 14, 15. For the reasons that follow, the Court will deny both motions.

21 **I. Legal Standards.**

22 When analyzing a complaint for failure to state a claim to relief under Rule  
23 12(b)(6), the well-pled factual allegations ““are taken as true and construed in the light  
24 most favorable to the nonmoving party.”” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th  
25 Cir. 2009) (citation omitted). Legal conclusions couched as factual allegations “are not  
26 entitled to the assumption of truth,” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), and  
27 therefore ““are insufficient to defeat a motion to dismiss for failure to state a claim,”” *In  
28 re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid a

1 Rule 12(b)(6) dismissal, the complaint must plead “enough facts to state a claim to relief  
 2 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This  
 3 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than  
 4 a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949  
 5 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the  
 6 court to infer more than the mere possibility of misconduct, the complaint has alleged –  
 7 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 1950 (quoting  
 8 Fed. R. Civ. P. 8(a)(2)).

9 An affirmative defense may not be raised in a Rule 12(b)(6) motion unless the  
 10 defense appears from the face of the complaint, *see Jones v. Block*, 549 U.S. 199, 215  
 11 (2007), or the defense raises no disputed issues of fact, *Scott v. Kuhlmann*, 746 F.2d  
 12 1377, 1378 (9th Cir. 1984). Where the motion to dismiss involves factual evidence  
 13 outside the pleadings, a court may discretionarily convert the Rule 12(b)(6) motion into a  
 14 motion for summary judgment under Rule 56 and give the parties a reasonable  
 15 opportunity to present all materials relevant to the motion. *See* Fed. R. Civ. P. 12(d);  
 16 *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

17 **II. Defendant Pistillo’s Motion to Dismiss.**

18 Plaintiff and Defendant Pistillo were married at the time Pistillo allegedly engaged  
 19 in the acts stated in Plaintiff’s complaint while an employee of the University of  
 20 Advancing Computer Technology, Inc. (“UAT”). Doc. 1-1 at 30-31; Doc. 7 at 2-3.  
 21 Plaintiff filed the present claims subsequent to their divorce. Doc. 1-1 at 26-27; Doc. 7 at  
 22 2-3. Pistillo argues that the claims against him are barred by the parties’ settlement  
 23 agreement incident to divorce. Doc. 7 at 2-3. Plaintiff does not argue that this  
 24 affirmative defense is not cognizable on a Rule 12(b)(6) motion.<sup>1</sup> *See* Doc. 10.

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 26 <sup>1</sup> Defendant Pistillo argues that the Court may take judicial notice of matters of  
 27 public record, and that because the divorce decree attached to Defendant’s motion to  
 28 dismiss is a public record and refers to the settlement agreement, the Court may also  
 properly take judicial notice of the settlement agreement. *See* Doc. 7 at 4-5. The court-  
 approved divorce decree expressly states, however, that the settlement agreement is not

1       The parties do not dispute that the settlement agreement stated: “Husband avows  
 2 he had no involvement in the decision by UAT to terminate wife’s employment. Nothing  
 3 contained herein restricts any claims wife may have or wish to pursue against UAT.”  
 4 Doc. 10 at 7. Moreover, Plaintiff does not deny that the agreement also states that “[a]ll  
 5 issues and claims that either party has or may have against the other that arose or may  
 6 have arisen prior to the date of their execution of this Agreement are resolved and settled  
 7 as a result of the agreements between the parties set forth in this Agreement.” Doc. 7 at  
 8 3; Doc. 10. Instead, Plaintiff makes three arguments: (1) the settlement agreement does  
 9 not preclude her present claims because the claims “arose” after the divorce decree was  
 10 filed, relying on *Windauer v. O’Connor*, 485 P.2d 1157, 1157-58 (Ariz. 1971); (2) the  
 11 provision quoted above does not bar claims related to the two parties’ employment  
 12 relationship; and (3) the provision is unenforceable due to lack of consideration. Doc. 10.

13       *Windauer* held, in the context of an intentional shooting of an elderly wife by an  
 14 elderly husband, that “a spouse may, after a divorce from the offending spouse, sue to  
 15 recover damages for an intentional tort” notwithstanding the doctrine of “interspousal tort  
 16 immunity.” 485 P.2d at 1158. *Windauer* did not decide when the cause of action arises,  
 17 however, nor was a settlement agreement an issue in that case. *Id.* Therefore, *Windauer*  
 18 is not dispositive here.

19       Plaintiff also argues that the settlement agreement does not bar claims related to  
 20 the parties’ employment relationship. Doc. 10 at 2-5. Plaintiff asserts that the settlement  
 21 agreement was limited to resolution of marital property and obligations. *Id.* at 4.  
 22 Plaintiff further asserts that Plaintiff did not release or waive claims – only that any  
 23 properly-construed claims were settled as a result of agreements between the parties. *Id.*  
 24 Although the plain language of the provision quoted above might imply a waiver of at  
 25 least some of Plaintiff’s claims against Pistillo individually, the parties dispute the intent  
 26 of the provision. Under Arizona law, the Court should consider any relevant extrinsic  
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28 merged into the decree. Doc. 7-1 at 28:16.

1 “evidence and, if . . . the contract language is ‘reasonably susceptible’ to the  
 2 interpretation asserted by its proponent, the evidence is admissible to determine the  
 3 meaning intended by the parties.” *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d  
 4 1134, 1140 (Ariz. 1993). Because evidence to be developed in this case might shed light  
 5 on the meaning of the settlement agreement, resolution of this issue must await the  
 6 summary judgment stage or trial.<sup>2</sup>

7 **III. Motion to Dismiss Counts II and IV.**

8 Defendants David and Sharon Bolman, Robert and Patricia Wright, and UAT  
 9 (“B.W.U. Defendants”) move to dismiss counts II (false light) and IV (intentional  
 10 infliction of emotional distress) under Rule 12(b)(6). Doc. 8.

11 **A. False Light.**

12 Plaintiff’s second claim for relief alleges that Defendants sent an email to 25 or 30  
 13 UAT employees stating that Plaintiff was dismissed for violating University policy.  
 14 Doc. 1-1 at 69, 72. B.W.U. Defendants’ sole argument for dismissal appears to be that  
 15 the publication requirement of the false-light cause of action was not met as a matter of  
 16 law because the number of employees was small, the memo was sent by management to  
 17 employees rather than to the general public, and many of the employees were interested  
 18 persons who “needed to be informed as to the reasons for Plaintiff’s absence from the  
 19 workplace.” *See* Doc. 8 at 3-7.

20 Assuming the email falsely stated that Plaintiff violated University policy, as the  
 21 Court must on this motion to dismiss, the issue is whether sufficient “publicity” occurred  
 22 to satisfy the requirements of false light. Under Arizona law, “‘publicity’ . . . means that  
 23 the matter is made public, *by communicating it to the public at large, or to so many*  
 24 *persons that the matter must be regarded substantially certain to become one of public*  
 25 *knowledge.* The difference [between ‘publication’ in defamation and ‘publicity’ in false-  
 26 light] is not one of the means of communication which may be oral, written, or by any

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28 <sup>2</sup> The Court need not reach Plaintiff’s “lack of consideration” argument.

1 other means. It is one of a communication that reaches, or is sure to reach, the public.”  
2 *Hart v. Seven Resorts, Inc.*, 947 P.2d 846, 854 (Ariz. App. 1997) (quoting Restatement  
3 (Second) of Torts § 652D) (emphasis in original). Whether the publication in this case  
4 satisfies this standard will depend on who received it, what connection they had to the  
5 matters discussed in the communication, whether it was important for them to know the  
6 information communicated, the likelihood that matters communicated to them would be  
7 disseminated further, and similar factual questions. The Court cannot resolve such  
8 factual issues on a motion to dismiss.

9 **B. Emotional Distress.**

10 A plaintiff claiming intentional infliction of emotional distress (“IIED”) under  
11 Arizona law must plead: (1) conduct by a defendant that is extreme and outrageous;  
12 (2) intent by defendant to cause emotional distress or defendant’s reckless disregard for  
13 the near certainty that distress will result from the conduct; and (3) occurrence of severe  
14 emotional distress as a result of the conduct. *Ford v. Revlon, Inc.*, 734 P.2d 580, 585  
15 (Ariz. 1987). B.W.U. Defendants’ sole argument appears to be that the conduct alleged  
16 in the complaint is not so extreme and outrageous as to meet the requirements of IIED as  
17 a matter of law. *See Doc. 8 at 7-12.*

18 An IIED claim requires conduct that is “so outrageous in character and so extreme  
19 in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious  
20 and utterly intolerable in a civilized community.” *Patton v. First Fed. Sav. & Loan Ass’n  
of Phoenix*, 578 P.2d 152, 155 (Ariz. 1978) (quoting *Cluff v. Farmers Ins. Exch.*,  
21 460 P.2d 666, 668 (Ariz. 1969)). The manner in which certain conduct occurs can satisfy  
22 the IIED requirements even if the conduct itself may not be outrageous. *See Mintz v. Bell  
Atlantic Sys. Leasing Int’l*, 905 P.2d 559, 565 n.1 (Ariz. App. 1995) (“The outrage in the  
23 cited example is not the settlement attempt, it is the insistent and boisterous manner in  
24 which that attempt was made.”). Dismissal of an IIED claim prior to summary judgment  
25 is proper only if “plaintiff is not entitled to relief under any facts susceptible of proof  
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1 under the claims stated.” *Id.* at 563.

2 Plaintiff’s complaint encompasses conduct spanning four months (Doc. 1-1 at 31-  
 3 38), and includes the following allegations, assumed to be true for purposes of this  
 4 motion: UAT reduced many of Plaintiff’s responsibilities after her husband, Defendant  
 5 Pistillo – who was also her supervisor partway through this process – filed for divorce;<sup>3</sup>  
 6 UAT gave Pistillo responsibility for five of the seven departments/sub-departments  
 7 Plaintiff used to manage; UAT assigned Plaintiff new supervisors who began micro-  
 8 managing her; Defendant Wright interviewed certain employees regarding statements  
 9 made by Plaintiff to a co-worker friend at a social event; UAT monitored Plaintiff’s work  
 10 computer and emails; UAT terminated Plaintiff’s employment as retaliation for her  
 11 claiming gender-based employment discrimination and for her use of Family Medical  
 12 Leave Act leave; and, upon termination, Defendants intentionally, falsely, and publicly  
 13 accused Plaintiff of so egregiously violating company policy as to require immediate  
 14 termination. *Id.*

15 Although the Court is inclined to agree that these actions do not satisfy the high  
 16 threshold for the IIED tort in Arizona, the Court cannot at this stage conclude that  
 17 “plaintiff is not entitled to relief under *any facts* susceptible of proof under the claims  
 18 stated.” *Mintz*, 905 P.2d at 563 (emphasis added). Such a determination is better made at  
 19 the summary judgment stage when the facts have been explored through discovery and  
 20 included more fully in the briefing to the Court.<sup>4</sup>

21 **IT IS ORDERED:**

22 1. Defendant Pistillo’s motion to dismiss (Doc. 7) is **denied** as stated above.

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24 <sup>3</sup> It appears that Plaintiff had multiple contemporaneous roles, including Dean of  
 25 Admissions and Student Affairs, manager of the Student Life Department, and Vice-  
 26 President-in-Training for the Recruitment Division. Doc. 1-1 at 57.

27 <sup>4</sup> Because B.W.U. Defendants moved for dismissal jointly rather than severally  
 28 and the parties did not argue dismissal of only a subset of the defendants, the Court will  
 not rule on whether Plaintiff’s IIED claims as to specific individual defendants can be  
 dismissed under Rule 12(b)(6).

2. B.W.U. Defendants' motion to dismiss Counts II and IV (Doc. 8) is **denied**.

Dated this 17th day of March, 2011.

David G. Campbell

David G. Campbell  
United States District Judge